Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1-24-66 OF 2002
VINCENT NG J
18 APRIL 2002

Civil Procedure *— Injunction — Interim injunction — Whether application for interim injunction against defendants from enforcing their rights under settlement agreement allowed — Whether existed serious or cogent prima facie triable issue to justify granting of interim order*

Civil Procedure *— Interest — Commencement date of interest — Interpretation of settlement agreement with regard to interest payment — Whether payment of interest deferred when repayment towards capital was deferred — Whether agreement and affidavit evidence presented sufficient proof with regard to when actual date of interest due and payable*

Constitutional Law *— Constitution — Infringement — Whether Pengurusan Danaharta Nasional Bhd Act 1998 s 72 ultra vires Federal Constitution arts 5(i) and 13(1)*

The plaintiff had entered into a facility agreement ('the facility agreement') with various financial institutions. Upon the plaintiff's default under the loan, the defendants acquired the plaintiff's non-performing loans and the securities from the financial institutions by way of statutory vestings certificates under the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act'). The defendants then pursued a loan restructuring strategy with the plaintiff of its indebtedness. The plaintiff was to, inter alia, repay a reduced amount of RM942m ('the settlement sum') provided the plaintiff met his obligations with interest to be paid quarterly at the fixed rate of 8.5%pa and an upfront payment of RM300m to be payable by the plaintiff by 31 December 2001. The time of the upfront payment of RM300m was extended from 31 December 2001 to 30 June 2002 provided that proof of funding of this upfront payment were forwarded and interest remained due and owing on a quarterly basis. A settlement agreement to this effect ('the settlement agreement') was executed on 8 October 2001 ('the settlement date'). The plaintiff failed to pay the interest. A letter of demand was issued by the defendants' solicitors. Hence, the current application for an injunction by a summons in chambers coupled with the filing of an originating summons. The issues were: (i) whether the interest payment was due and payable on 31 December 2001 and not on 30 June 2002 as it was a separate and independent obligation from that requiring the plaintiff to pay the upfront payment of RM300m on 30 June 2002; (ii) whether thereby existed prima facie serious triable issues to grant the plaintiff's application for an interim injunction; and (iii) whether the Act and especially s 72, a provision to be an absolute statutory bar to the

issuance of an injunction against Danaharta or its subsidiaries, was unconstitutional by virtue of arts 5(1) and 13(1) of the Federal Constitution ('the Constitution') with regards to deprivation of life or personal liberty and property.

Held, dismissing the plaintiff's application with costs:

(1) The controversy revolved around the interpretation of cl 2.4 of the settlement agreement with regard to interest payment. The import of cl 2.4 was somewhat equivocal and appeared to be crafted with lack of focus or application of mind. The exchange of correspondence between the parties indicated that the first quarterly interest was indeed due and outstanding on 31 December 2001 and the court was more inclined to this view (see pp 729E, 730C, 731A–B).

(2) There was not a single letter or note which stated that the first quarterly interest was not due or need not be paid until 30 June 2002. It stood to reason that the plaintiff would have promptly written such a letter had such agreement on the due date of interest been arrived at. Further, there was no pointed denial in a reply written on his instructions (exh 'TR–9'), save to repeat that the interest was not due. Upon the affidavit evidence presented, it was held that though an issue pertaining to interest had arisen, the plaintiff had not discharged the onus on him to make out a serious or cogent prima facie triable issue to justify the granting of an interim injunction (see pp 730E, 731C, 733F–G).

(3) The plaintiff would be unable to make good the damages that the defendants would suffer in the event an injunctive order was made, as the plaintiff was unable to satisfy his existing debts. This was based on his own admission in his statutory declaration that his assets were insufficient to meet his existing liabilities. Hence, the plaintiff's undertaking to court as to damages was inadequate (see p 734D–E).

(4) In the teeth of such cogent evidential material presented, the court could not rationally hold that the balance of convenience would lie in favour of the plaintiff, especially as the defendants were only exercising their statutory duties in their dealings with the plaintiff, to ensure due recovery of a huge debt pursuant to an Act of Parliament passed in the national interest. The plaintiff, in contrast, was a borrower who, as alleged by the defendants, had been in default in his obligations as aforesaid. Further, the plaintiff had sought to move this court with unclean hands, and equity should not assist a plaintiff who had come to court with unclean hands (see pp 736H–737A).

(5) The court could not accept the argument that the Act was ultra vires arts 5(1) and 13(1) of the Constitution; and by the same token and upon the further consideration that s 72 of the Act appeared to be an essential provision necessary for the

achievement of its expressed objective, the court held that the provision did not infringe the two articles of the Constitution. It was pertinent to bear in mind that s 72 was introduced perforce much later as an imperative measure to counter a litigant's proclivity or propensity — in the present day Malaysian litigation culture — to reach out for injunctive reliefs at every turn at the drop of the hat. On the above assumptions, it would follow that s 72 was not at all at odds with any article of the Constitution (see p 738F–H).

(6) No injunctions could be ordered against any of the defendants. Section 72, though quite unprecedented in its scope, was not wholly without parallel in the law. Section 29 of the Government Proceedings Act 1956 also protected the government and its officers from injunctive orders (see p***); *Tengku Haji Jaafar v Government of the State of Pahang* [1978] 2 MLJ 105 and *Nanthakumaran v Jaffnese Co-operative Housing Society Ltd* [1980] 1 MLJ 114 followed (see p 741D).

Obiter:

The settlement agreement in the instant case was a commercial contract and by adopting a purposive construction of the same, this court could also took judicial notice of the common practice in commercial banking arrangements that when repayment towards capital was deferred, payment against interest would normally be ongoing and not deferred (see p 741A–B).

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian kemudahan ('perjanjian kemudahan tersebut') dengan beberapa institusi kewangan. Akibat kegagalan plaintif di bawah pinjaman tersebut, defendan-defendan telah mengambil alih pinjaman-pinjaman tidak terlaksana dan sekuriti-sekuriti plaintif daripada institusi-institusi kewangan tersebut melalui sijil-sijil statutori di bawah Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta tersebut'). Defendan-defendan kemudian telah membuat satu strategi penyusunan semula pinjaman dengan plaintif berhubung keberhutangannya. Plaintif dikehendaki, antara lain, membayar balik jumlah yang telah dikurangkan iaitu RM942 juta ('jumlah penyelesaian tersebut') dengan syarat plaintif memenuhi tanggungjawab-tanggungjawab beliau berserta faedah yang perlu dibayar setiap suku tahun pada kadar tetap 8.5% setahun dan bayaran pendahuluan sebanyak RM300 juta yang perlu dibayar oleh plaintif sebelum atau pada 31 Disember 2001. Masa untuk membuat bayaran pendahuluan RM300 juta tersebut telah dilanjutkan daripada 31 Disember 2001 kepada 30 Jun 2002 dengan syarat bukti pembiayaian bayaran pendahuluan tersebut dikemukakan dan faedah kekal perlu dibayar dan terakru berasaskan bayaran suku

A tahunan. Satu perjanjian penyelesaian ('perjanjian penyelesaian tersebut') telah disempurnakan pada 8 Oktober 2001 ('tarikh penyelesaian tersebut'). Plaintif telah gagal membayar faedah tersebut. Satu surat tuntutan telah dikeluarkan oleh peguamcara defendan-defendan. Justeru itu, wujud permohonan ini untuk satu injunksi melalui satu saman dalam kamar bersama pemfailan satu B saman pemula. Persoalan-persoalannya adalah: (i) sama ada pembayaran faedah perlu dibayar pada 31 Disember 2001 dan bukan pada 30 Jun 2002 kerana ia adalah satu tanggungjawab yang berasingan daripada yang menghendaki plaintif membayar bayaran pendahuluan RM300 juta pada 30 Jun 2002; (ii) sama ada oleh demikian wujud persoalan-persoalan prima facie serius yang boleh C dibicarakan untuk membenarkan permohonan plaintif untuk satu injunksi interim; dan (iii) sama ada Akta tersebut dan s 72, satu peruntukan yang merupakan satu rintangan statutori yang mutlak untuk membenarkan satu injunksi terhadap Danaharta atau subsidiari-subsidiarinya, adalah tidak berperlembagaan menurut D perkara-perkara 5(1) dan 13(1) Perlembagaan Persekutuan ('Perlembagaan tersebut') berhubung kehilangan kebebasan hidup dan harta.

Diputuskan, menolak permohonan plaintif dengan kos:

E (1) Kontroversi ini adalah berkisar tentang tafsiran kl 2.4 perjanjian penyelesaian tersebut berhubung bayaran faedah. Maksud kl 2.4 adalah kabur dan telah diolah dengan fokus dan penerapan minda yang kurang. Pertukaran surat-menyurat antara pihak-pihak tersebut menandakan bahawa faedah pertama daripada bayaran suku tahunan tersebut sememangnya perlu dibayar pada F 31 Disember 2001 dan mahkamah lebih cenderung kepada pandangan ini (lihat ms 729E, 730C, 731A–B).

(2) Tiada sepucuk surat atau notis yang menyatakan faedah pertama daripada bayaran suku tahunan tersebut tidak perlu dibayar sehingga 30 Jun 2002. Ia sewajarnya menunjukkan bahawa plaintif pasti akan menulis dengan segera surat sedemikian rupa G jika satu persetujuan tentang tarikh faedah tersebut yang perlu dicapai telah ditetapkan. Tambahan pula, tiada penafian nyata dalam balasan bertulis plaintif tentang arahan beliau ini (eksh 'TR-9'), kecuali hanya mengulangi bahawa faedah tersebut tidak perlu dibayar. Berdasarkan keterangan afidavit yang H dikemukakan, adalah diputuskan bahawa walaupun satu persoalan berhubung faedah telah timbul, plaintif gagal melepaskan beban atas beliau untuk membuktikan satu persoalan yang serius atau meyakinkan yang perlu dibicarakan untuk menjustifikasikan pemberian satu injunksi interim (lihat ms 730E, 731C, 733F–G).

I (3) Plaintif tidak mampu untuk membayar ganti rugi yang defendan-defendan akan alami sekiranya satu perintah injunksi dibuat, kerana plaintif tidak mampu untuk membayar hutang-hutang

beliau yang sedia ada. Ini berdasarkan pengakuan beliau sendiri dalam deklarasi statutori beliau bahawa aset-aset beliau tidak mencukupi untuk menampung liabiliti beliau yang sedia ada. Justeru itu, akujanji plaintif kepada mahkamah tentang ganti rugi tidak mencukupi (lihat ms 734D–E).

(4) Dengan kehadiran keterangan material yang meyakinkan yang telah dikemukakan, mahkamah tidak boleh secara rasional memutuskan bahawa imbangan kesesuaian adalah menyebelahi plaintif, terutamanya apabila defendan-defendan nyata hanya menjalankan kewajipan statutori mereka dalam urusan mereka dengan plaintif, bagi memastikan pengembalian sejumlah besar hutang yang perlu dibayar menurut satu Akta Parlimen yang diluluskan demi kepentingan awam. Plaintif sebaliknya adalah seorang peminjam yang, seperti yang dikatakan oleh defendan-defendan, telah gagal dalam obligasi beliau. Tambahan pula, plaintif telah memohon kepada mahkamah dengan tangan yang kotor, dan ekuiti tidak sepatutnya membantu seorang plaintif yang datang ke mahkamah dengan tangan yang kotor (lihat ms 736H–737A).

(5) Mahkamah tidak menerima hujah bahawa Akta tersebut adalah ultra vires perkara-perkara 5(1) dan 13(1) Perlembagaan tersebut; dan dengan sebab yang sama dan setelah pertimbangan selanjutnya bahawa s 72 Akta tersebut kelihatan sebagai satu peruntukan yang perlu untuk memperoleh objektif yang dinyatakan, mahkamah memutuskan bahawa peruntukan tersebut tidak melanggar kedua-dua perkara Perlembagaan tersebut. Adalah penting untuk dipertimbangkan bahawa s 72 telah diperkenalkan penguatkuasaannya kemudian sebagai satu langkah imperatif bagi membanteras kecondongan dan kecenderungan seorang litigan — dalam budaya litigasi Malaysia hari ini — yang memohon relif-relif injunksi pada setiap peluang yang ada. Berdasarkan andaian-andaian di atas, adalah diikut bahawa s 72 sememangnya tidak langsung bercanggah dengan mana-mana perkara Perlembagaan tersebut (lihat ms 738F–H).

(6) Tiada injunksi yang boleh diperintahkan terhadap mana-mana defendan. Seksyen 72, walaupun tiada duluan dalam skopnya, tidak keseluruhannya tidak selari dengan undang-undang. Seksyen 29 Akta Prosiding Kerajaan 1956 juga melindungi kerajaan dan pegawai-pegawainya daripada perintah injunksi (lihat ms 741D); *Tengku Haji Jaafar v Government of the State of Pahang* [1978] 2 MLJ 105 dan *Nanthakumaran v Jaffnese Co-operative Housing Society Ltd* [1980] 1 MLJ 114 diikut.

Obiter:

Perjanjian penyelesaian tersebut dalam kes ini adalah satu kontrak komersial dan dengan menerapkan satu pendekatan mengikut tujuan kontrak itu, mahkamah ini juga boleh mengambil

pengiktirafan kehakiman tentang amalan biasa dalam urusan perbankan komersial bahawa apabila pembayaran balik terhadap modal telah ditunda, pembayaran terhadap faedah biasanya berterusan dan tidak ditunda (lihat ms 741A–B).]

Notes

For cases on interim injunction generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2625–2706.

For cases on commencement date of interest, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3011–3013.

For a case on infringement against the constitution, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 146.

Cases referred to

Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Dai-Ichi Electronics (M) Sdn Bhd v Tenage Nasional Bhd [1996] 4 MLJ 506 (refd)

E Gopal & Anor v Awang bin Mona [1978] 2 MLJ 251 (refd)

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)

Nanthakumaran v Jaffnese Co-operative Housing Society Ltd & Ors [1980] 1 MLJ 114 (folld)

Ooi Meng Sua v Aetna Universal Insurance Sdn Bhd [1995] 1 AMR 467 (refd)

Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657 (refd)

Repco Holdings Sdn Bhd & Ors v Pengurusan Danaharta Nasional Bhd & Ors (No 2) [2000] 5 MLJ 637 (refd)

Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 289 (refd)

Tengku Haji Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105 (folld)

WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25, Schedule para 6
Federal Constitution arts 5(1), 13(1)
Government Proceedings Act 1956 s 29
Pengurusan Danaharta Nasional Bhd Act 1998 ss 57(1)(a), 60(1), 72
Rules of the High Court 1980 O 38 r 2(3)
Specific Relief Act 1950 ss 50, 51, 52, 53, 54, 55

Ong Chee Kuan (*Gopal Sreenevasan, Danny Yap, Lee Hock Chye* and *Shahnaaz Omar* with him) (*Lee Ong & Kandiah*) for the plaintiff. A

Tommy Thomas (*Sitpah Selvaratnam* and *Chow Siew Wai* with him) (*Lee Choon Wan & Co*) for the defendants.

Vincent Ng J: Before the case commenced, I felt that there were several apparent issues of procedure that needed to be settled. Firstly, to the B question from the court on the procedure employed by the plaintiff, the defendants — quite rightly, I must observe — conceded that as the determination of the case primarily involves construction of a document (to wit the settlement agreement) the plaintiff had appropriately proceeded under originating summons. Secondly, when the court indicated that in order to obviate double hearings, appeals, judgments and bites at the C proverbial cherry, I was ready and minded to proceed straight to hear the originating summons, subject of course to the consent of both parties, in view of O 38 r 2(3) of the Rules of the High Court 1980 ('the RHC') (pertaining to the right to apply to cross examine the deponents of affidavits) both parties insisted on the court hearing the summons in chambers first. And so, as agreed, the proceedings proceeded in such D manner.

For ease of reading, I would propose to divide my judgment into three parts, namely, the facts, the merits of the plaintiff's injunction application, and lastly, the validity or legal integrity and construction of s 72 of the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Act') and the Act E itself.

The facts

By a facility agreement dated 13 July 1994 ('the facility agreement') entered into between the plaintiff and various financial institutions, the plaintiff was F granted a syndicated term loan facility in the sum of RM1.792m ('the loan') for the purpose of his acquisition from Bank Negara Malaysia of a 32% stake in the shares of Malaysian Airline System Bhd. By a supplemental facility agreement dated 27 February 1998, the plaintiff entered into a second agreement with the same financial institutions relating to the loan.

G

The plaintiff was in default of his loan with the said financial institutions. In consequence, the defendants acting in accordance with their stated objectives, acquired the plaintiff's non-performing loans and the securities thereto from the said financial institutions. Such acquisitions were by way of three statutory vestings under the Act. And, three vesting certificates were issued in respect of the: H

(i) first defendant's acquisition of the plaintiff's non-performing loan of RM380m as at 27 April 1999 from syndicate lenders — RHB Sakura Merchant Bankers Bhd, Arab-Malaysian Merchant Bank Bhd and RHB Bank Bhd;

(ii) second defendant's acquisition of the plaintiff's non-performing loan I of RM418.84m as at 31 December 1998 from Bank Bumiputra (M) Bhd; and

A (iii) third defendant's acquisition of the plaintiff's non-performing loan of RM295.18m as at 30 September 1998 from Sime Bank Bhd.

After the acquisition of the loans by the defendants, the defendants pursued a loan restructuring strategy with the plaintiff of its indebtedness, which by 31 January 2001 stood at RM1,315,938,556. The principal terms of the B defendants' offer of restructuring were that:

(a) the plaintiff repay a reduced amount of RM942m ('the settlement sum'); a discount of RM373,938,556 provided the plaintiff met his obligations;

(b) interest was to be paid quarterly at the fixed rate of 8.5%pa; and

C (c) an upfront payment of RM300m was to be payable by the plaintiff by 31 December 2001, or upon an identified event.

The plaintiff sought to extend the time of the upfront payment of RM300m from 31 December 2001 to 30 June 2002. Subject to proof of funding of this upfront payment, the defendants were agreeable to an extension to D 30 June 2002. According to the defendants, interest remained due and owing on a quarterly basis.

The settlement agreement ('the settlement agreement') was executed on 8 October 2001 ('the settlement date'). The principal terms of the settlement agreement are that:

E (a) the total outstanding of RM1.41b due and payable by the plaintiff to the defendants as at 8 October 2001 be reduced (by RM468m) to RM942m as the settlement sum, provided the plaintiff met his obligations;

(b) the settlement sum of RM942m be payable in four instalments:

F (i) RM215m on or before 30 June 2002;

(ii) RM215m on or before 30 June 2003;

(iii) RM215m on or before 30 June 2004;

(iv) RM297m on or before 30 June 2005.

G (c) interest at 8.5%pa be payable quarterly, with default interest at 9.5% on arrears;

(d) an upfront payment of RM300m be payable on or before 30 June 2002 towards satisfaction of (b)(i) and overdue interest;

(e) the security for repayment included:

H (i) 130,435,250 TRI shares then representing a 17.27% stake in TRI;

(ii) 309,648,000 Naluri Bhd shares representing a 44.84% stake; and

(iii) 45,200,000 Promet (Langkawi) Resorts Sdn Bhd shares representing 80% stake.

I

It was the defendants' contention that the first quarterly interest due was payable on 31 December 2001 under cl 2.4 of the settlement agreement and

that the plaintiff had failed to pay this first quarterly interest arising immediately after the settlement agreement, amounting to RM18,646,438.36.

This default in payment of interest led to the issue by the defendants' solicitors of a letter of demand dated 11 February 2002 for payment of such interest, which states in the following terms:

> Take notice that in the event the aforesaid sum of RM18,646,438.36 is not received by Danaharta within thirty (30) days from the date hereof, Danaharta reserves the right to exercise and enforce all or any of their rights under and pursuant to the said settlement agreement and further reserves the right to commence legal proceedings against you to claim for all monies due and owing to Danaharta wherein you would be further liable for all costs incurred therein.

This led to the current application for an injunction by a summons in chambers coupled with the filing of an originating summons. The summons in chambers (encl 3), which the parties have agreed should be heard first, sought the following prayers:

(i) an injunction is granted wherein the defendants, their representatives, nominees and/or agents are absolutely prohibited from enforcing any of their rights under a settlement agreement dated 8 October 2001 entered between the plaintiff and the defendants ('the said settlement agreement') especially but not limited to the reason that the plaintiff breached the said settlement agreement by failing to pay interest allegedly owed to the defendants amounting to RM18,646,438.36 since 31 December 2001;

(ii) Without prejudicing the contents of para (i), the defendants specifically are prohibited from selling, charging and/or howsoever conducting any form of transactions against any shares beneficially owned by the plaintiff which are presently held and/or obtained by the defendants under the said settlement agreement, including but not limited to the following issues:

  (a) 309,648,000 shares in Naluri Bhd (formerly known as Malaysian Helicopter Services Bhd);

  (b) 130,435,250 shares in Technology Resources Industries Bhd; and

  (c) 45,200,000 shares in Promet (Langkawi) Resorts Sdn Bhd.

The gist of the above prayers sought are:

(i) a blanket prohibition from defendants enforcing any of their rights under the settlement agreement;

(ii) to prohibit defendants from dealing with the mortgaged shares in the three companies (namely the TRI, Naluri Bhd and Promet (Langkawi) Resorts Sdn Bhd shares);

(iii) to prohibit defendants from exercising their rights in relation to any rights issue 'that may be conducted' with regard to the mortgaged shares. And, it is to be noted that they are all settlement agreement rights.

A *On the merits*

The focal point of the bitter controversy is cl 2.4 of the said settlement agreement which was crafted in the following language:

> B *Interest:* The parties hereby agree that interest calculated at a fixed rate of eight point five percent (8.5%) per annum in respect of the settlement sum or any outstanding part thereof shall be payable by the debtor to Danaharta on a quarterly basis, commencing on the effective date until the full payment or repayment of the settlement sum. Notwithstanding the effective date, the parties hereby agree that for ease of calculation, the next quarter period for payment of interest after the effective date shall be 31 March, 30 June, 30 September and 31 December, whichever is the soonest after the effective C date and the debtor shall pay interest in respect of the settlement sum thereafter on such quarterly periods. A written statement from Danaharta shall be conclusive evidence of the amount of interest to be paid hereunder and shall be binding on the debtor save for manifest error. Without prejudice to the payment or repayment method set out in cl 2.3, the debtor further agrees to pay to Danaharta, the sum of Ringgit Malaysia three hundred D million (RM300,000,000) only on or before 30 June 2002 for purposes of payment of all interest accruing in respect of the settlement sum from the effective date until 30 June 2002 or such earlier date of payment of the aforesaid sum by the debtor. Any balance after the application of the said sum of Ringgit Malaysia three hundred million (RM300,000,000) only shall be used to reduce the settlement sum or such outstanding part thereof in direct E order of maturity.

There is a difference of opinion on the interpretation of the settlement agreement with regard to interest payment. The defendants do not agree with the plaintiff's contention that interest is not due and payable on 31 December 2001, and need only be paid by him when he pays upfront F payment of RM300m on 30 June 2002. The defendants, on their part, contend that the interest payment is due and payable on 31 December 2001 and this is a separate and independent obligation from that requiring the plaintiff to pay the upfront payment of RM300m on 30 June 2002.

Though the value of the subject matter of the injunction sought is G indeed astronomical, the legal principles governing this court's exercise of its equitable jurisdiction is simple, trite and incontrovertible. I am keenly aware that I should not at this stage undertake a fine tooth comb examination of the affidavit evidence since both parties are entitled to apply to cross examine the deponents when the matter is tried. It is precisely for this reason that this court is unable to depart from the trite and firmly H established traditional approach by applying the 'overwhelming case' test in *Repco Holdings Sdn Bhd & Ors v Pengurusan Danaharta Nasional Bhd & Ors (No 2)* [2000] 5 MLJ 637, at p 654 that was so strenuously urged upon me by Mr Tommy Thomas. It must be borne in mind that when *Repco* was decided, s 72 of the Act was yet to be introduced and his Lordship in that case may have been driven to adopt that novel test. I Nevertheless, as the current state of litigation culture is marked by an exponential rise in applications for interim injunctions, and the respondents are just as entitled to be shielded from unwarranted attacks on

and impairment of their rights as much as the applicants to assert their rights, it is my view that similar to the burden placed on a defendant in an O 14 application, an applicant for an interim injunction application is required (besides the balance of convenience and the availability of damages tests) to demonstrate to the satisfaction of the court not only that an issue has arisen between the parties, but also that the issue, which would affect the outcome of the case, is prima facie a serious issue and clearly triable. To determine whether prima facie serious triable issue or issues — which, in my view, means a cogent prima facie triable issue — have been shown, the court would first have to ask itself whether there are enough affidavit material from both parties before the court for evaluation. In the case at hand, considering the voluminous affidavits and exhibits placed before this court from the plaintiff and the defendants, I am well placed at this stage to examine them so as to enable me to hold whether there are serious questions to be tried. I regret to note that the import of cl 2.4 is somewhat equivocal and appears to be crafted with lack of focus or application of mind. Be that as it may, yet the surrounding circumstances which call for consideration and which throw a good deal of light on the intention of the parties leads me to the prima facie view — pending the hearing of the originating summons, where the parties have the right under O 38 r 2(3) of the RHC to apply to cross examine the deponents of the affidavits filed — that the defendants' version concerning the interest issue is the more probable, for the following reasons:

(i) among the various correspondence exhibited by both parties, there is not a single letter or note which states that the first quarterly interest is not due or need not be paid until 30 June 2002. It stands to reason that the plaintiff would have promptly written such a letter had such agreement on the due date of interest been arrived at. Notably, the expression used in cl 2.4 was 'The debtor further agrees to pay to Danaharta' and in cl 2.6(a) 'or furnish such interest payment'. And, it is common ground that the sum of RM942m constituted principal only;

(ii) the plaintiff had been given a discount of RM468m from his total indebtedness which stood at RM1.41b as at 8 October 2001, with over four years' grace period to make good his debts with the defendants — it truly appears to be a very generous, godsend effort on the part of the defendants to rescue the plaintiff. Thus, it appears highly improbable in the commercial milieu, that the parties at the material time of the settlement agreement or thereafter would have agreed that not a cent was to be paid by the plaintiff towards interest from the settlement date, 8 October 2001 to 30 June 2002 — the defendants could have been generous but could not have intended to be so slaphappy with their responsibilities to the national interests. Most importantly, this factor must be considered in the light of the undisputed fact that originally, the upfront payment of RM300m was to be made by the plaintiff by 31 December 2001. I agree with counsel's submission that the defendants had acted professionally, though my observation is that some of their letters to the plaintiff

should have been expressed with greater clarity (regrettably, the genesis of the case now before me);

(iii) the exchange of correspondence between the parties, namely, letters dated 7 March 2002 (exh 'Z–10'), 9 March 2002 (exh 'Z–11') and 13 March 2002 (exh 'TR–9') which are here set out would indicate that the first quarterly interest was indeed due and outstanding on 31 December 2001. I am more inclined to this view as it will be observed that the penultimate para of exh 'Z–11' addressed to the plaintiff contains the following words: 'In any case you are inconsistent in your stand as at the said meeting you informed us that you are unable to pay interest due on 31 December 2001 as you are preserving your funds for the proposed rights issue'. Yet, there was no pointed denial that this was what he said, in a reply dated 13 March 2002 written on his instructions (exh 'TR–9'), save to repeat that the interest was not due.

The contents of exh 'Z–10':

7 March 2002

Encik Abdul Hamidy Hafiz
Managing Director
Pengurusan Danaharta Nasional Bhd
Tingkat 12 Bangunan Setia 1
15 Lorong Dungun
Bukit Damansara
50490 Kuala Lumpur

Dear Encik Hamidy

SYNDICATED CREDIT FACILITY OF RM942 MILLION

I refer to the meeting between your goodself, En Zukri Samat, En Bistamam Ramli and myself held at your office on 6 March 2002. I also refer to the following:

(i) letter dated 11 February 2002 from Pengurusan Danaharta Nasional Bhd ('Danaharta') solicitors, Messrs Lee Choon Wan & Co to me;

(ii) your letter dated 5 March 2002 to me; and

(iii) letter from my solicitors, Messrs Lee Ong & Kandiah to your solicitors dated 6 March 2002.

During the meeting, you agreed to an extension of time until 20 March 2002 to enable me to submit to you details of the plan to pay Danaharta RM300m due on 30 June 2002. Briefly, the funds will be raised pursuant to a corporate exercise to be undertaken by Naluri Bhd ('Naluri'). I shall be able to submit more details to you after the board of Naluri has met and considered the merits of the exercise and details thereof announced to the Kuala Lumpur Stock Exchange.

My position in respect of the interest allegedly due and payable on 31 December 2001 is that it shall be paid on or before 30 June 2002 as part of the RM300m. In this respect, I am not in default of the terms of the settlement agreement and your right to enforce the terms thereof and the security documents thereunder has not arisen.

For good order, please confirm the matters set out above. A

Wassalam.

Yang benar,
Sgd
Tajudin Ramli

The contents of exh 'Z–11': B

MD/D7/2002/6

9 March 2002

Yang Berbahagia Tan Sri Dato' Tajuddin Ramli
23rd Floor, Menara TR
161-B Jalan Ampang C
50450 Kuala Lumpur Private & Confidential

Yang Berbahagia Tan Sri

SYNDICATED TERM LOAN OF RM1.792 BILLION

We refer to your letter of today's date. Unfortunately, our recollection of what was agreed at the meeting differs from that set out in your letter. D

Specifically, we did not agree to any extension of time for you to provide satisfactory evidence of your financial capacity to pay the RM300m due and payable on or before 30 June 2002.

Instead, you said that you would provide such evidence by Tuesday, 12 March 2002 as this was the day on which the board of Naluri Bhd would meet to discuss a corporate exercise. In fact, you asked En Bistamam Ramli who attended the meeting with you to see if the Naluri board meeting could be brought forward. E

We note your position in respect of the interest due and payable on 31 December 2001. As you are aware, we take a different position. In any case, you are inconsistent in your stand as at the said meeting, you informed us that you are unable to pay the interest due on 31 December 2001 as you are preserving your funds for the proposed Rights Issue. F

We look forward to receiving the required information by 12 March 2002.

Yours faithfully

Pengurusan Danaharta Nasional Bhd G
Sgd

Abdul Hamidy Hafiz

Managing Director

The contents of exh 'TR–9': H

13 March 2002

Encik Abdul Hamidy Hafiz
Managing Director
Pengurusan Danaharta Nasional Bhd
Tingkat 12 Bangunan Setia 1
15 Lorong Dungun I
Bukit Damansara
50490 Kuala Lumpur

Encik Hamidy

SYNDICATED CREDIT FACILITY OF RM942 MILLION

I refer to the meeting at your office on 6 March 2002 and your letter dated 9 March 2002 to Tan Sri Dato' Tajuddin Ramli ('Tan Sri').

Tan Sri has requested that I write to you as he is presently out of town.

As requested during the meeting, I enclose the announcement by Naluri Bhd ('Naluri') to the Kuala Lumpur Stock Exchange setting out the details of the corporate exercise to be undertaken by Naluri. Pursuant to the corporate exercise, Tan Sri shall receive a sum of approximately RM320m. Although it is likely that the sum of RM320m will not be available to Tan Sri on or before 30 June 2002, arrangements are being made for Tan Sri to obtain bridging finance on the security of such payment in order for Tan Sri to honour his obligations to you under the settlement agreement, subject to the terms therein contained.

I would also like to clarify Tan Sri's statement referred to in para 4 of your letter dated 9 March 2002. The funds required to subscribe for the shares of Technology Resources Industries Bhd pursuant to the proposed rights issue will be raised through borrowings (subject to the terms of the settlement agreement). In this respect, please confirm:

(i) that you will cause RHB Merchant Nominees (Tempatan) Sdn Bhd to renounce the right to subscribe for the rights issue in Tan Sri's favour; and

(ii) that you agree that the party granting to Tan Sri the facility may take a security interest over the rights shares financed by such party.

Additionally, there is no question of Tan Sri being unable to pay the interest alleged by you to be due on 31 December 2001 as it is clear from the documents that such obligation has not yet arisen. Whatever your interpretation of the documents at this stage, please confirm by close of office tomorrow that you will not enforce any security in respect of the facility.

Yours faithfully,
Sgd
Bistamam Ramli

Thus, at this stage, upon the affidavit evidence presented before me, I would hold that though an issue pertaining to interest has arisen, the plaintiff has not discharged the onus on him to make out a serious or cogent prima facie triable issue to justify the granting of an interim injunction. Before I move on to the law, there are two other issues pertaining to the exercise of the courts' equitable powers for consideration.

The nugatory factor

A further essential ingredient for issuance of an interim injunction is that the plaintiff has to satisfy this court that in view of the circumstances and/or the financial position of the defendants, the latter would not be in the position to make good the loss and damages should the plaintiff succeed in his claim. I must observe that the plaintiff's affidavit in support of the application does not contain any averments on this score, let alone condescending to any credible particulars on this 'nugatory ingredient' save an assertion that if the

shares are sold, he would lose control of the companies and irreparable damage would ensue. In this regard, my attention is drawn by defendants' counsel to the fact that only in regard to Promet (Langkawi) Resorts Sdn Bhd has the plaintiff an over 50% stake. Nevertheless, as counsel for the plaintiff has conceded that the relevant shares pledged as security had been assigned to the defendants, which necessitated the need to secure a proxy from the defendants to vote, the plaintiff does not have real control of the said companies. In other words, his control of the three companies, if any at all existed, is only exercisable at the behest or with the indulgent approval of the defendants.

A further material consideration is that the defendants being Danaharta, I am satisfied that damages would be an adequate remedy for the plaintiff should he succeed in his claim. The plaintiff's failure to subscribe for the TRI rights issue (such assertion on affidavit by the defendants being not denied) in itself reveals that the plaintiff has no real interest in participating in TRI as a company. I would hold that loss from the sale of his shares held as security by the defendants can be compensated in damages, and that the defendants are able to meet such award of damages. In contrast, it would appear that the plaintiff would be unable to make good the damages that the defendants would suffer in the event an injunctive order is made, as the plaintiff is unable to satisfy his existing debts. This is based on his own admission in his statutory declaration that his assets are insufficient to meet his existing liabilities. Hence, the plaintiff's undertaking to court as to damages is inadequate.

The balance of convenience and 'unclean hands' factor

The threat or distinct probability of an impending breach of contract by an applicant for the interim injunctive relief may be material consideration especially if the same is averred to but not rebutted in opposing affidavits. This consideration is material as the court should avoid finding itself in the invidious position of bearing witness to a blatant breach of the subject contract by the applicant soon after granting the interim injunction. In the instant case, the defendants had made a pointed allegation in paras 29, 30 and 39 of the defendants' affidavit affirmed on 27 March 2002 (encl 7) of the plaintiff's breach of cl 6(a) of the memorandum of deposit to take up the rights issue valued at RM130,435,250 on or before 25 March 2002, thereby entailing an impending breach on 4 April 2002 of cl 3.2 of the settlement agreement by virtue of the notice dated 27 March 2002. The three material clauses are here set out verbatim:

> 29 We are advised by our solicitors and verily believe that the plaintiff acted wrongfully, and in breach of cl 6(a) of the memorandum of deposit in not making payment of the said sum of RM130,435,250 to the defendants or their agents on or before 12pm on 25 March 2002. This resulted in the defendant sending a notice on 27 March 2002, pursuant to cl 3.2 of the settlement agreement, to the plaintiff requiring him to rectify his default within 30 days. Now produced and shown to me and marked as exh 'Z–16' to 'Z–19' are copies of the said notices.

A

30 We have reason to believe that, consistent with the practise in the Malaysian capital market, the underwriters in the TRI rights issue exercise had placed a condition that the underwriting obligation is conditional upon the plaintiff (and his nominee, Arah Murni) taking up their subscriptions. The plaintiff's failure to pay the Agent the said sum of RM130,435,250 may result in the underwriters not wishing to B continue to underwrite the rights issue which would then place the entire exercise in jeopardy to the prejudice of the defendants whose mortgaged shares in TRI would then be left diluted at 10.61%, and the public who acted in reliance on the proposed rights issue.

C 39 In any event, the defendants are advised by their solicitors and verily believe that the plaintiff by acting in breach of contract since 1998, not having made any attempt to repay his loan outstanding for many years and not taking up the subscription of the rights issue, the plaintiff has not come with 'clean hands', thereby precluding him from seeking the equitable relief of injunctive orders.

This allegation was not expressly or impliedly rebutted by the plaintiff in his D affidavit in reply (encl 12) affirmed on 27 March 2002; there being no assertion or assurance that he intends to or had plans to take up the rights issues in TRI, as he is required to do so under cl 6(a) of the memorandum of deposit and cl 3.2 of the settlement agreement. It is trite that an assertion in an affidavit, if not rebutted by affidavit is deemed admitted. Consequently, there is an undisputed breach of cl 6(a) of the memorandum E of deposit and an impending breach of cl 3.2 of the settlement agreement is also envisaged as a distinct probability.

On the precise and particular nature of the prejudice and potential damage that the plaintiff's past and anticipated breach would cause to the defendants, I need do no more than to set out here a short excerpt of learned F counsel's submission when he urged this court to withhold granting the plaintiff equitable relief:

> Notwithstanding his default in payment of interest on 31 December 2001, the plaintiff requested the defendants in January 2002 for proxy to vote in a particular fashion in respect of the corporate restructuring exercise proposed G by TRI, whose shares were held by the defendants as security. The restructuring exercise of TRI, if implemented, would dilute the defendants' security in the following manner:

Scenario	Plaintiff's stake in TRI currently mortgaged to the defendants	% Stake
H		
1	Before restricted issue and rights issue exercises	17.27%
2	After restricted issue exercise	10.61%
I 3	After restricted issue and rights issue if the plaintiff takes up the rights.	13.14%

4	After restricted issue and rights issue if the plaintiff does not take up the rights.	6.57%

The defendants were terribly concerned by the unfolding events. Accordingly, the defendants requested the plaintiff to furnish the requisite proof of funding of the RM300m upfront payment by 24 January 2001. No proof was provided. The plaintiff instead, declared at a meeting with the defendants that he had not serviced interest on 31 December 2001, because he was reserving his funds to subscribe for the TRI rights issue. The first limb of the TRI corporate restructuring proceeded with the completion of the restricted issue, and the defendants mortgaged shares in TRI has now been diluted to 10.61%. The next stage of the TRI restructuring was the rights issue. By a letter dated 12 March 2002, RHB Merchant Nominees (Tempatan) Sdn Bhd informed RHB Sakura Merchant Bankers Bhd ('the Agent') that the TRI rights issue were allotted to the plaintiff and his nominee, Arah Murni Sdn Bhd in respect of 11,600,250 and 118,835,000 rights shares respectively. The total cost of the rights issue was RM130,435,250, which would have to be paid to the Agent by 4 April 2002. In order for the plaintiff to take up this rights issue pursuant to his obligation under cl 6(a) of the memorandum of deposit, the defendants by letters dated 13 March 2002 informed the plaintiff and Arah Murni Sdn Bhd that the respective sum of RM11,600,250 and RM118,835,000 were to be deposited with the defendants' bank account or the agent's bank account no later than 12pm, 20 March 2002. At a meeting between the plaintiff and the defendants on 19 March 2002, the time for the deposit of this sum was later mutually extended to 12pm, 25 March 2002. The plaintiff failed to deposit the sum of RM130,435,250 by 25 March 2002 in breach of cl 6(a) of the Memorandum of deposit, and in consequential breach of the facility agreement and the settlement agreement. This breach by the plaintiff to subscribe to the rights issue has serious repercussions, particularly on the value of the securities held by the defendants. As a result of the plaintiff's breach, the defendants sent a notice to the plaintiff on 27 March 2002, pursuant to cl 3.2 of the settlement agreement requiring the plaintiff to rectify his default within 30 days. Hence, the plaintiff is currently in default of the interest payment due on 31 December 2001 in the sum of RM18,646,438.36, and in default of his obligation to subscribe for the rights issue by payment of RM130,435,250 due on 25 March 2002. In consequence, the defendants are entitled to pursue their rights upon either or both of defaults. If the breach is not duly cured in accordance with the settlement agreement, the defendants may exercise their rights to realize the securities held, towards repayment of the indebtedness of the plaintiff to the defendants. The defendants have a further right to respond in an appropriate manner to any possible future breaches by the plaintiff of obligations that continue to arise under the settlement agreement, such as payment of monies due on 30 June 2002. In the circumstances, we submit that the injunction orders sought by the plaintiff to restrain the defendants from exercising their rights under the settlement agreement, or dealing with the securities in enforcement of rights (which rights are capable of exercise in numerous circumstances), should not be granted in this factual matrix (which tells against the plaintiff).

In the teeth of such cogent evidential material presented to me, how could I rationally hold that the balance of convenience would lie in favour of the plaintiff, especially as the defendants are only exercising their statutory duties in their dealings with the plaintiff, to ensure due recovery of a huge

A debt pursuant to an Act of Parliament passed in the national interest. The plaintiff, in contrast, is a borrower who, as alleged by the defendants, has been in default in his obligations as aforesaid. I am also of the further view that the plaintiff has sought to move this court with unclean hands, and equity should not assist a plaintiff who has come to court with unclean hands. Consequently, upon the three equitable principles discussed above, B this court should decline to grant the prayers sought in encl 3.

The law

On this topic, it must be noted that both counsel for the plaintiff made no C attempt to submit that the Act or s 72 of same was ultra vires the Federal Constitution, and no assertion or declaration in such terms were sought in the originating summons. Indeed, the expressed thrust of the plaintiff's case was twofold, namely: (a) the construction that the court should place on s 72; and (b) the waiver by the defendants, and in consequence, the operation of the principle of estoppel against the defendants 'from using all D rights pursuant to the Act save and except upon the occurrence of a default in the settlement agreement'. Nevertheless, as the issue whether the Act and s 72 is unconstitutional has often been taken by counsel in other cases, it may perhaps be appropriate for me to also deal with this point. Despite the plaintiff being circumscribed as aforesaid in his pleaded case, yet in an oblique fashion, couched as a plea for proper construction of s 72, counsel E for the plaintiff sought to attack the Act and the provision of s 72 by invoking arts 5(1) and 13(1) of the Federal Constitution. Article 5(1) of the Federal Constitution states that 'No person shall be deprived of life or personal liberty save in accordance with the law' (as construed by the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289 at p 308 — it was submitted). Article 13(1) provides that F 'No person shall be deprived of property save in accordance with law' (and a wrongful exercise of power in error of the law must be struck down as 'not in accordance with the law' — it was further submitted). Surely, any methodical logician would find no difficulty in concluding that when a provision (such as s 72 here) is crystal clear, an attempt to ascribe a meaning G to the provision that is other than its plain literal meaning is tantamount to implying, with tongue in cheek, that the provision ought not be there at all.

For an insight on the *raison d'être* or rationale which brought about the conception and birth of the Act, it is essential to set out and bear in mind the preamble of the Act to which this court has to attach sufficient weight, H and under which light its essential provisions must be read. Perhaps in the same context, the other relevant provisions of the Act could also be set out verbatim:

> WHEREAS special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote I the revitalisation of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities:

AND WHEREAS legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good:

AND WHEREAS Pengurusan Danaharta Nasional Bhd has been established as a corporation incorporated under the Companies Act 1965 for such purposes:

72 Limits on the grant of orders of court

Notwithstanding any law, an order of a court cannot be granted —

(a) Which stays, restrains or affects the powers of the corporation, oversight committee, special administrator or independent advisor under this Act;

(b) Which stays, restrains or affects any action taken, or proposed to be taken, by the corporation, oversight committee, special administrator or independent advisor under this Act;

(c) Which compels the corporation, oversight committee, special administrator or any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

And, s 60(1) and (2) pertaining to the application of the Act to subsidiaries of the corporation state:

(1) Subject to sub-ss (2), (3) and (4), the provisions of parts IV, V, VII, VIII and X of this Act shall apply to every subsidiary of the corporation prescribed under sub-s (2) as if the subsidiary is the corporation itself.

(2) The minister may, on the recommendation of the corporation, by notification in the *Gazette*, prescribe such subsidiaries of the corporation for the purpose of sub-s (1).

Upon plain reading of the preamble, it is beyond question that the Act is a social legislation necessitated by the harsh exigencies brought about by the Asian economic crisis in which our nation was not spared. It was designed, indeed expressly legislated for the singular purpose of saving the economy from collapse. Seen in this light, I cannot accept the argument that the Act is ultra vires arts 5(1) and 13(1) of the Constitution; and by the same token and upon the further consideration that s 72 of the Act appears to be an essential provision necessary for the achievement of its expressed objective, I would hold that the provision does not infringe the two articles of our Constitution. It is pertinent to bear in mind that s 72 was introduced perforce much later as an imperative measure to counter a litigant's proclivity or propensity — in the present day Malaysian litigation culture — to reach out for injuctive reliefs at every turn at the drop of the hat. On the above assumptions, it would follow that s 72 is not at all at odds with any article of the Constitution. When considering the question of constitutionality, it is important to bear in mind that nowhere in the Act is the plaintiff's right to sue for damages for breach of contract barred or restricted; for if that be so, it may be struck down due to its inherent stamp of unconstitutionality.

The real argument which Mr Gopal Sreenevasan, for the plaintiff, advances on issue (a) is that s 72 of the Act must be interpreted in a manner

which must be harmonious with the basic provisions of the Constitution and the interpretation to be adopted must be one that is most agreeable with justice and reason. I must hasten to add that this submission per se on the general principles is not untenable — indeed eminently supportable. It is however incumbent on this court to consider the application of the general principle in the context of the case at hand to determine whether the counsel's arguments could be demolished piece by piece. Three cases were cited by counsel to this end, namely: *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657; *Dai-Ichi Electronics (M) Sdn Bhd v Tenage Nasional Bhd* [1996] 4 MLJ 506 and *E Gopal & Anor v Awang bin Mona* [1978] 2 MLJ 251. Upon reading them, I found that the ratio in all the three cases are unhelpful to the plaintiff's cause. *Petaling Tin* is authority for the proposition that ouster clauses are effective only if an inferior tribunal had not made a jurisdictional error within or without jurisdiction. To further back up this point in their argument, Mr Ong Chee Kwan for the plaintiff also cited my decision in *Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor* [1994] 2 MLJ 167 where in relation to the ouster clause, s 33(B) of the Industrial Relations Act 1967, I had held:

> ... the courts have been averse to give a literal interpretation to such a privative or finalty clause. Thus, the courts have sought to neutralize the effects of these privative clauses on the rationale that a decision arrived at in excess of legal powers (or if the industrial court had done or failed to do something in the course of the inquiry which it ought to or ought not to do) was no decision at all and could not be saved by any privative clause, however strongly worded it may be. Thus, it is settled that court should give an expansive rather than narrow or strict interpretation to such ouster clauses in statutes.
>
> Because there is a need to ensure that Industrial Courts function according to the law that conferred upon it the authority to decide, and upon the well-established principle that a creature of statute is cloathed with such powers only as are conferred on it by the statute which created it, it has been consistently argued and held by the courts that such privative clauses cannot shelter the actions of the Industrial Court from judicial review.

This aspect of the submission is untenable as, firstly it is not seriously contended that s 72 constituted an ouster clause, as it is clearly a provision to restrict the reliefs available to the applicant. And secondly, though the High Court has acquired the appellation of 'the court below' from 'the court above', it is not an inferior court in any sense of the word or an inferior tribunal (such as an Industrial Court) that is subject or amenable to the relief of prerogative writs.

In *Dai-Ichi*, I had expressed the following view: 'It is trite that, in construing statutory provisions, the courts ought to presume the salutary intention of Parliament for the nation it serves; and Parliament in its ascribed wisdom, is incapable of undermining the better interests of the public or community'. And, on that proposition I held that the words in s 38(1) of the Electricity Supply Act 1990 — which apparently gave an employee of Tenaga Nasional Bhd the power to disconnect electrical power after issuing a 24 hour notice to the consumer, which includes an industrial consumer, upon his mere 'opinion' that an offence of tempering had been

committed — ought not be read in isolation or given its literal construction, but should be read in conjunction with ss 37(1), (3), (4) and 38(5) of that Act. The reason being that if the courts were to adopt the literal construction it would have the harsh effect of undermining confidence and driving away foreign investors from Malaysia, and this cannot be the intention of Parliament which is presumed to have the better interests of its citizens at heart in all its legislation. And, Dai-Ichi Electronics (M) Sdn Bhd was such a foreign investor in Penang with a large factory employing a sizeable workforce. Indeed now, to ruminate further, my view is that upon the same proposition, s 38(1) may be held to be unconstitutional under arts 5(1) and 13(1). Notably, s 38(1) would appear tainted with a heavy element of '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). I had occasion to discuss the '*Wednesbury* principle' (applicable in judicial review cases) in *Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perai* [1996] 4 MLJ 16.

Thus, this authority not only does not support the plaintiff's cause but conversely in effect supports the defendants', considering that the Act and s 72 is, for the reasons I have set out above, legislated for the sole purpose of saving our then collapsing Malaysian economy in the aftermath of the 1997 financial crisis. This being the case, the Act and the provision would perfectly dovetail with my dicta in *Dai-Ichi*, and a plain and literal reading of s 72 would accord with the general principles of construction so eloquently put by counsel of the plaintiff.

E Gopal, the last case cited by learned counsel only concerns the meaning of acting in good faith — on the part of the minister of home affairs — and it cannot be said that the legislature had introduced s 72 in bad faith or has caused mischief to the constitutional rights of its subjects.

The four case authorities cited by learned counsel in support of issue (b) on waiver and estoppel are also of no assistance — namely *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 and *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229. Indeed, the ratio in *Kimlin* is adverse to the plaintiff's case as therein it was held that on public policy considerations, the statutory provisions in the National Land Code which are designed for the protection of chargors could not be waived or contracted out. Thus, reverting to the present case, by the same token, I would hold that the defendants could not in law, even if they had so wished, contract out of or waive the operation of s 72. In any event, as it is a settled requirement that waiver of rights must be expressed or could be inferred by clear conduct (within the definition of waiver in *WJ Alan*), in the instant case I could find no waiver, expressed or implied, of the operation of any of the provisions of the Act in any of the clauses in the settlement agreement. Neither do I detect any waiver by conduct which could trigger the operation of estoppel such as occurred in *Boustead Trading*. Further, estoppel and waiver, even if found against the defendants, is irrelevant as it is the plaintiff who seeks to move the court for an injunction

in which, in my view, a plain and literal reading of the crystal clear wording of s 72 leads the court to conclude that the legislature intended the provision to be an absolute statutory bar to the issuance of an injunction against Danaharta or its subsidiaries. The last authority, *Antaios Cia Naviera*, enjoins the court to adopt a purposive construction of commercial documents and contracts. The settlement agreement in the instant case is a commercial contract and by adopting a purposive construction of same, this court could also take judicial notice of the common practice in commercial banking arrangements that when repayment towards capital is deferred, payment against interest would normally be ongoing and not deferred.

The second and third defendants are fully owned subsidiaries of Pengurusan Danaharta Nasional Bhd. By virtue of s 60(1) of Act, the second and third defendants are also entitled to rely on s 72. Lastly, this court must also give recognition to the additional statutory right and power under s 57(1)(a) of the Act vested on the defendants 'to dispose of such property or any part of such property by way of private treaty ... notwithstanding any other law and in addition to any other power the corporation has under any contract or any other law' — which is self-explanatory and requires no elaboration.

Thus, no injunctions can be ordered against any of the defendants. Section 72, though quite unprecedented in its scope, is not wholly without parallel in our law. Section 29 of the Government Proceedings Act 1956 protects the government and its officers from injunctive orders. Section 29 of the Government Proceedings Act 1956 has been upheld in Malaysian Courts (see *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 and *Nanthakumaran v Jaffnese Co-operative Housing Society Ltd & Ors* [1980] 1 MLJ 114). The power of the High Court to grant an interlocutory or final injunction is derived from statute. Common law does not give power to the High Court, or for that matter, any other court to grant injunctive relief. In Malaysia, only the Superior Courts have the statutory power to grant injunctions. Inferior courts like the sessions court or administrative tribunals like the Industrial Court do not possess the power to grant injunctions. The statutory basis for a Malaysian High Court (and that too, a judge of the High Court and not a senior assistant registrar or deputy registrar) is found in s 25, read together with para 6 of the Sch to the Courts of Judicature Act 1964 and ss 50 to 55 of the Specific Relief Act 1950. The procedure relating to the granting of injunctions is found in O 29 of the RHC. It follows that what statute can give, statute can also take away or limit. Statutory provisions like s 29 of the Government Proceedings Act 1956, s 40(1) of the Societies Act (even O 29 r 2C of the RHC is a close parallel) and s 72 of the Act are examples of Parliament's intention in certain specified and limited circumstances to take away such injunctive power.

It is incontrovertible that s 72 constituted a caveat against the granting of a restraining order directed at the courts. And, it is trite that parties cannot contract out of or waive clear and affirmative provisions of a statute. Thus, in the present case, I would hold that this court is precluded by expressed crystal clear provision in s 72 from granting the injunction or

restraining order sought by the plaintiff. Good judges are, after all, abiding servants of the law whose decisions are tempered with good conscience coupled with a heavy dose of common sense and delivered with the right hand on the heart and both feet firmly on terra firma.

In conclusion, after a careful and anxious study and global consideration encompassing the substantive merits of the application as deposed in the affidavits and the pertaining law, and after having heard extensive and extended arguments from a battery of lawyers on both sides, I am entirely satisfied that the injunction sought ought not be granted and I dismissed the plaintiff's application with costs.

Immediately after my decision, the plaintiff prayed for an Erinford stay. This was also dismissed due to the s 72 impediment (see *Ooi Meng Sua v Aetna Universal Insurance Sdn Bhd* [1995] 1 AMR 467 at p 476, where I had occasion to discuss this species of stay).

In postlude

A word of comment on my earlier approach in not granting a restraining order pending hearing would be in order. I am of the view that because of the unique, crystal clear and quite unprecedented caveat in s 72 of the Act (unless amended, which is recommended), the court is not empowered to make a restraining order pending the hearing of the injunction application (which is sometimes tagged as a holding over or status quo order in non-jurisprudential parlance) though such order is normally made in all other situations as a matter of course. An analytical approach leads to the inevitable conclusion that a court cannot make an order in the interim which is, irrespective of merits of the application, unavailable in the ultimate by virtue of s 72.

Litigation is not always about law and facts. At times it has to do with attitudes and realities that often intrude upon the affairs of men. What is sometimes termed as hard power entails muscle and brawn which is often admixed with a dash of arrogance. Whereas, soft power is about deeds and persuasion to get the other side to do what one wants him to do by projecting or portraying a convergence of interests between both sides. On hard power, in the context of sovereign states, one often hears the expression 'win the war but lose the peace' in terms of a nation's vital interests (such as a world power now finds itself lurching inexorably towards — a calamity). Soft power may often be the preferred option in certain circumstances whatever the advice of legal counsel, particularly if it runs against the grain of the raw realities of the situation. I would not venture to observe, upon the prima facie nature of the evidence now available, that the plaintiff had taken the wrong approach. This court should not upon affidavit evidence close its mind on the issue, and the plaintiff may yet succeed to prove his assertions, though even then the law on the injunctive relief that he sought may yet militate against him. The plaintiff is the best judge on the wisdom of the approach he has taken and should take. Perhaps, with the real issues now focussed and projected in such stark naked terms, he could in the quietude of his quiet interludes mull over his predicament.

When one reckons in the realm of about one billion (being the settlement figure — that is, provided the defendants do not carry through their threat of reverting to the 'indebtedness' figure of RM1,410,175,765.43 under cl 3.2) the sum of RM18 odd million is relatively a paltry figure.

Plaintiff's application dismissed with costs.

Reported by Ezatul Zuria Azhari